

## **IC 23-1-43**

### **Chapter 43. Business Combinations**

#### **IC 23-1-43-1**

##### **"Affiliate" defined**

Sec. 1. As used in this chapter, "affiliate" means a person that directly, or indirectly through one (1) or more intermediaries, controls, is controlled by, or is under common control with, a specified person.

*As added by P.L.149-1986, SEC.27.*

#### **IC 23-1-43-2**

##### **"Announcement date" defined**

Sec. 2. As used in this chapter, "announcement date", when used in reference to any business combination, means the date of the first public announcement of the final, definitive proposal for the business combination.

*As added by P.L.149-1986, SEC.27.*

#### **IC 23-1-43-3**

##### **"Associate" defined**

Sec. 3. As used in this chapter, "associate", when used to indicate a relationship with any person, means:

- (1) any corporation or organization of which the person is an officer or partner or is, directly or indirectly, the beneficial owner of ten percent (10%) or more of any class of voting shares;
- (2) any trust or other estate in which the person has a substantial beneficial interest or as to which the person serves as trustee or in a similar fiduciary capacity; and
- (3) any relative or spouse of the person, or any relative of the spouse, who has the same home as the person.

*As added by P.L.149-1986, SEC.27.*

#### **IC 23-1-43-4**

##### **"Beneficial owner" defined**

Sec. 4. As used in this chapter, "beneficial owner", when used with respect to any shares, means a person that:

- (1) individually or with or through any of its affiliates or associates, beneficially owns the shares (directly or indirectly);
- (2) individually or with or through any of its affiliates or associates, has:
  - (A) the right to acquire the shares (whether the right is exercisable immediately or only after the passage of time) under any agreement, arrangement, or understanding (whether or not in writing), or upon the exercise of conversion rights, exchange rights, warrants or options, or otherwise (however, a person is not considered the beneficial owner of shares tendered under a tender or exchange offer made by the person or any of the person's affiliates or

associates until the tendered shares are accepted for purchase or exchange); or

(B) the right to vote the shares under any agreement, arrangement, or understanding (whether or not in writing) (however, a person is not considered the beneficial owner of any shares under this clause if the agreement, arrangement, or understanding to vote the shares arises solely from a revocable proxy or consent given in response to a proxy or consent solicitation made in accordance with the applicable regulations under the Exchange Act and is not then reportable on a Schedule 13D under the Exchange Act, or any comparable or successor report); or

(3) has any agreement, arrangement, or understanding (whether or not in writing) for the purpose of acquiring, holding, voting (except voting under a revocable proxy or consent as described in subdivision (2)(B)), or disposing of the shares with any other person that beneficially owns, or whose affiliates or associates beneficially own, directly or indirectly, the shares.

*As added by P.L.149-1986, SEC.27.*

#### **IC 23-1-43-5**

##### **"Business combination" defined**

Sec. 5. As used in this chapter, "business combination", when used in reference to any resident domestic corporation and any interested shareholder of the resident domestic corporation, means any of the following:

(1) Any merger of the resident domestic corporation or any subsidiary of the resident domestic corporation with:

(A) the interested shareholder; or

(B) any other corporation (whether or not itself an interested shareholder of the resident domestic corporation) that is, or after the merger or consolidation would be, an affiliate or associate of the interested shareholder.

(2) Any sale, lease, exchange, mortgage, pledge, transfer, or other disposition (in one (1) transaction or a series of transactions) to or with the interested shareholder or any affiliate or associate of the interested shareholder of assets of the resident domestic corporation or any subsidiary of the resident domestic corporation:

(A) having an aggregate market value equal to ten percent (10%) or more of the aggregate market value of all the assets, determined on a consolidated basis, of the resident domestic corporation;

(B) having an aggregate market value equal to ten percent (10%) or more of the aggregate market value of all the outstanding shares of the resident domestic corporation; or

(C) representing ten percent (10%) or more of the earning power or net income, determined on a consolidated basis, of the resident domestic corporation.

(3) The issuance or transfer by the resident domestic

corporation or any subsidiary of the resident domestic corporation (in one (1) transaction or a series of transactions) of any shares of the resident domestic corporation or any subsidiary of the resident domestic corporation that have an aggregate market value equal to five percent (5%) or more of the aggregate market value of all the outstanding shares of the resident domestic corporation to the interested shareholder or any affiliate or associate of the interested shareholder except under the exercise of warrants or rights to purchase shares offered, or a dividend or distribution paid or made, pro rata to all shareholders of the resident domestic corporation.

(4) The adoption of any plan or proposal for the liquidation or dissolution of the resident domestic corporation proposed by, or under any agreement, arrangement, or understanding (whether or not in writing) with, the interested shareholder or any affiliate or associate of the interested shareholder.

(5) Any:

(A) reclassification of securities (including without limitation any share split, share dividend, or other distribution of shares in respect of shares, or any reverse share split);

(B) recapitalization of the resident domestic corporation;

(C) merger or consolidation of the resident domestic corporation with any subsidiary of the resident domestic corporation; or

(D) other transaction (whether or not with or into or otherwise involving the interested shareholder);

proposed by, or under any agreement, arrangement, or understanding (whether or not in writing) with, the interested shareholder or any affiliate or associate of the interested shareholder, that has the effect (directly or indirectly) of increasing the proportionate share of the outstanding shares of any class or series of voting shares or securities convertible into voting shares of the resident domestic corporation or any subsidiary of the resident domestic corporation that is directly or indirectly owned by the interested shareholder or any affiliate or associate of the interested shareholder, except as a result of immaterial changes due to fractional share adjustments.

(6) Any receipt by the interested shareholder or any affiliate or associate of the interested shareholder of the benefit (directly or indirectly, except proportionately as a shareholder of the resident domestic corporation), of any loans, advances, guarantees, pledges, or other financial assistance or any tax credits or other tax advantages provided by or through the resident domestic corporation.

*As added by P.L.149-1986, SEC.27.*

**IC 23-1-43-6**

**"Common shares" defined**

Sec. 6. As used in this chapter, "common shares" means any shares other than preferred shares.

*As added by P.L.149-1986, SEC.27. Amended by P.L.5-1988, SEC.121.*

#### **IC 23-1-43-7**

##### **"Consummation date" defined**

Sec. 7. As used in this chapter, "consummation date", with respect to any business combination, means the date of consummation of the business combination or, in the case of a business combination as to which a shareholder vote is taken, the later of:

- (1) the business day before the vote; or
- (2) twenty (20) days before the date of consummation of the business combination.

*As added by P.L.149-1986, SEC.27.*

#### **IC 23-1-43-8**

##### **"Control" defined**

Sec. 8. (a) As used in this chapter, "control", including the terms "controlling", "controlled by", and "under common control with", means the possession (directly or indirectly) of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.

(b) A person's beneficial ownership of ten percent (10%) or more of the voting power of a corporation's outstanding voting shares creates a presumption that the person has control of the corporation.

(c) Notwithstanding subsections (a) and (b), a person is not considered to have control of a corporation if the person holds voting power, in good faith and not for the purpose of circumventing this chapter, as an agent, bank, broker, nominee, custodian, or trustee for one (1) or more beneficial owners who do not individually or as a group have control of the corporation.

*As added by P.L.149-1986, SEC.27.*

#### **IC 23-1-43-9**

##### **"Exchange Act" defined**

Sec. 9. As used in this chapter, "Exchange Act" means the Act of Congress known as the Securities Exchange Act of 1934, as amended.

*As added by P.L.149-1986, SEC.27.*

#### **IC 23-1-43-10**

##### **"Interested shareholder" defined**

Sec. 10. (a) As used in this chapter, "interested shareholder", when used in reference to any resident domestic corporation, means any person (other than the resident domestic corporation or any subsidiary of the resident domestic corporation) that is:

- (1) the beneficial owner, directly or indirectly, of ten percent (10%) or more of the voting power of the outstanding voting

shares of the resident domestic corporation; or

(2) an affiliate or associate of the resident domestic corporation and at any time within the five (5) year period immediately before the date in question was the beneficial owner, directly or indirectly, of ten percent (10%) or more of the voting power of the then outstanding shares of the resident domestic corporation.

(b) For the purpose of determining whether a person is an interested shareholder, the number of voting shares of the resident domestic corporation considered to be outstanding includes shares considered to be beneficially owned by the person through application of section 4 of this chapter, but does not include any other unissued shares of voting shares of the resident domestic corporation that may be issuable under any agreement, arrangement, or understanding, or upon exercise of conversion rights, warrants or options, or otherwise.

*As added by P.L.149-1986, SEC.27.*

#### **IC 23-1-43-11**

##### **"Market value" defined**

Sec. 11. As used in this chapter, "market value", when used in reference to shares or property of any resident domestic corporation, means the following:

(1) In the case of shares, the highest closing sale price of a share during the thirty (30) day period immediately preceding the date in question on the composite tape for New York Stock Exchange listed shares, or, if the shares are not quoted on the composite tape or not listed on the New York Stock Exchange, on the principal United States securities exchange registered under the Exchange Act on which the shares are listed, or, if the shares are not listed on any such exchange, the highest closing bid quotation with respect to a share during the thirty (30) day period preceding the date in question on the National Association of Securities Dealers, Inc. Automated Quotations System or any system then in use, or if no such quotation is available, the fair market value on the date in question of a share as determined by the board of directors of the resident domestic corporation in good faith.

(2) In the case of property other than cash or shares, the fair market value of the property on the date in question as determined by the board of directors of the resident domestic corporation in good faith.

*As added by P.L.149-1986, SEC.27.*

#### **IC 23-1-43-12**

##### **"Preferred shares" defined**

Sec. 12. As used in this chapter, "preferred shares" means any class or series of shares of a resident domestic corporation that under the bylaws or articles of incorporation of the resident domestic corporation:

- (1) is entitled to receive payment of dividends before any payment of dividends on some other class or series of shares; or
- (2) is entitled in the event of any voluntary liquidation, dissolution, or winding up of the corporation to receive payment or distribution of a preferential amount before any payments or distributions are received by some other class or series of shares.

*As added by P.L.149-1986, SEC.27. Amended by P.L.5-1988, SEC.122.*

#### **IC 23-1-43-13**

##### **"Resident domestic corporation" defined**

Sec. 13. (a) As used in this chapter, "resident domestic corporation" means a corporation that has one hundred (100) or more shareholders.

(b) A resident domestic corporation does not cease to be a resident domestic corporation by reason of events occurring or actions taken while the resident domestic corporation is subject to this chapter.

*As added by P.L.149-1986, SEC.27.*

#### **IC 23-1-43-14**

##### **"Share" defined**

Sec. 14. As used in this chapter, "share" means:

- (1) any share or similar security, any certificate of interest, any participation in any profit sharing agreement, any voting trust certificate, or any certificate of deposit for a share; and
- (2) any security convertible, with or without consideration, into shares, or any warrant, call, or other option or privilege of buying shares without being bound to do so, or any other security carrying any right to acquire, subscribe to, or purchase shares.

*As added by P.L.149-1986, SEC.27.*

#### **IC 23-1-43-15**

##### **"Share acquisition date" defined**

Sec. 15. As used in this chapter, "share acquisition date", with respect to any person and any resident domestic corporation, means the date that the person first becomes an interested shareholder of the resident domestic corporation.

*As added by P.L.149-1986, SEC.27.*

#### **IC 23-1-43-16**

##### **"Subsidiary" defined**

Sec. 16. As used in this chapter, "subsidiary" of any resident domestic corporation means any other corporation of which a majority of the outstanding voting shares entitled to be cast are owned (directly or indirectly) by the resident domestic corporation.

*As added by P.L.149-1986, SEC.27. Amended by P.L.5-1988, SEC.123.*

**IC 23-1-43-17****"Voting shares" defined**

Sec. 17. As used in this chapter, "voting shares" means shares of capital stock of a corporation entitled to vote generally in the election of directors.

*As added by P.L.149-1986, SEC.27.*

**IC 23-1-43-18****Business combination with interested shareholder within five years of share acquisition date**

Sec. 18. (a) Notwithstanding any other provision of this article (except sections 20 through 24 of this chapter), a resident domestic corporation may not engage in any business combination with any interested shareholder of the resident domestic corporation for a period of five (5) years following the interested shareholder's share acquisition date unless the business combination or the purchase of shares made by the interested shareholder on the interested shareholder's share acquisition date is approved by the board of directors of the resident domestic corporation before the interested shareholder's share acquisition date.

(b) If a good faith proposal regarding a business combination is made in writing to the board of directors of the resident domestic corporation, the board of directors shall respond, in writing, within thirty (30) days or such shorter period, if any, as may be required by the Exchange Act, setting forth its reasons for its decision regarding the proposal.

(c) If a good faith proposal to purchase shares is made in writing to the board of directors of the resident domestic corporation, the board of directors, unless it responds affirmatively in writing within thirty (30) days or such shorter period, if any, as may be required by the Exchange Act, is considered to have disapproved the share purchase.

*As added by P.L.149-1986, SEC.27.*

**IC 23-1-43-19****Business combination with interested shareholder; requirements**

Sec. 19. Notwithstanding any other provision of this article (except sections 18 and 20 through 24 of this chapter), a resident domestic corporation may not engage at any time in any business combination with any interested shareholder of the resident domestic corporation other than a business combination meeting all requirements of the articles of incorporation of the domestic corporation and the requirements specified in any of the following:

- (1) A business combination approved by the board of directors of the resident domestic corporation before the interested shareholder's share acquisition date, or as to which the purchase of shares made by the interested shareholder on the interested shareholder's share acquisition date had been approved by the board of directors of the resident domestic corporation before the interested shareholder's share acquisition date.

(2) A business combination approved by the affirmative vote of the holders of a majority of the outstanding voting shares not beneficially owned by the interested shareholder proposing the business combination, or any affiliate or associate of the interested shareholder proposing the business combination, at a meeting called for that purpose no earlier than five (5) years after the interested shareholder's share acquisition date.

(3) A business combination that meets all of the following conditions:

(A) The aggregate amount of the cash and the market value as of the consummation date of consideration other than cash to be received per share by holders of outstanding common shares of the resident domestic corporation in the business combination is at least equal to the higher of the following:

(i) The highest per share price paid by the interested shareholder, at a time when the interested shareholder was the beneficial owner (directly or indirectly) of five percent (5%) or more of the outstanding voting shares of the resident domestic corporation, for any common shares of the same class or series acquired by it within the five (5) year period immediately before the announcement date with respect to the business combination or within the five (5) year period immediately before, or in, the transaction in which the interested shareholder became an interested shareholder, whichever is higher; plus, in either case, interest compounded annually from the earliest date on which the highest per share acquisition price was paid through the consummation date at the rate for one (1) year United States Treasury obligations from time to time in effect; less the aggregate amount of any cash dividends paid, and the market value of any dividends paid other than in cash, per common share since the earliest date, up to the amount of the interest.

(ii) The market value per common share on the announcement date with respect to the business combination or on the interested shareholder's share acquisition date, whichever is higher; plus interest compounded annually from that date through the consummation date at the rate for one (1) year United States Treasury obligations from time to time in effect; less the aggregate amount of any cash dividends paid, and the market value of any dividends paid other than in cash, per common share since that date, up to the amount of the interest.

(B) The aggregate amount of the cash and the market value as of the consummation date of consideration other than cash to be received per share by holders of outstanding shares of any class or series of shares, other than common shares, of the resident domestic corporation is at least equal to the highest of the following (whether or not the interested



shareholder has previously acquired any shares of the class or series of shares):

(i) The highest per share price paid by the interested shareholder, at a time when the interested shareholder was the beneficial owner (directly or indirectly) of five percent (5%) or more of the outstanding voting shares of the resident domestic corporation, for any shares of the class or series of shares acquired by it within the five (5) year period immediately before the announcement date with respect to the business combination or within the five (5) year period immediately before, or in, the transaction in which the interested shareholder became an interested shareholder, whichever is higher; plus, in either case, interest compounded annually from the earliest date on which the highest per share acquisition price was paid through the consummation date at the rate for one (1) year United States Treasury obligations from time to time in effect; less the aggregate amount of any cash dividends paid, and the market value of any dividends paid other than in cash, per share of the class or series of shares since the earliest date, up to the amount of the interest.

(ii) The highest preferential amount per share to which the holders of shares of the class or series of shares are entitled in the event of any voluntary liquidation, dissolution, or winding up of the resident domestic corporation, plus the aggregate amount of any dividends declared or due as to which the holders are entitled before payment of dividends on some other class or series of shares (unless the aggregate amount of the dividends is included in the preferential amount).

(iii) The market value per share of the class or series of shares on the announcement date with respect to the business combination or on the interested shareholder's share acquisition date, whichever is higher; plus interest compounded annually from that date through the consummation date at the rate for one (1) year United States Treasury obligations from time to time in effect; less the aggregate amount of any cash dividends paid, and the market value of any dividends paid other than in cash, per share of the class or series of shares since that date, up to the amount of the interest.

(C) The consideration to be received by holders of a particular class or series of outstanding shares (including common shares) of the resident domestic corporation in the business combination is in cash or in the same form as the interested shareholder has used to acquire the largest number of shares of the class or series of shares previously acquired by it, and the consideration shall be distributed promptly.

(D) The holders of all outstanding shares of the resident domestic corporation not beneficially owned by the

interested shareholder immediately before the consummation of the business combination are entitled to receive in the business combination cash or other consideration for the shares in compliance with clauses (A), (B), and (C).

(E) After the interested shareholder's share acquisition date and before the consummation date with respect to the business combination, the interested shareholder has not become the beneficial owner of any additional voting shares of the resident domestic corporation except:

(i) as part of the transaction that resulted in the interested shareholder becoming an interested shareholder;

(ii) by virtue of proportionate share splits, share dividends, or other distributions of shares in respect of shares not constituting a business combination under section 5(5) of this chapter;

(iii) through a business combination meeting all of the conditions of section 18 of this chapter and this section; or

(iv) through purchase by the interested shareholder at any price that, if the price had been paid in an otherwise permissible business combination the announcement date and consummation date of which were the date of the purchase, would have satisfied the requirements of clauses (A), (B), and (C).

*As added by P.L.149-1986, SEC.27. Amended by P.L.5-1988, SEC.124.*

#### **IC 23-1-43-20**

##### **Corporation having shares registered under Exchange Act; application of chapter**

Sec. 20. This chapter does not apply to any business combination of a resident domestic corporation that does not, as of the share acquisition date, have a class of voting shares registered with the Securities and Exchange Commission under Section 12 of the Exchange Act, unless the corporation's articles of incorporation provide otherwise.

*As added by P.L.149-1986, SEC.27.*

#### **IC 23-1-43-21**

##### **Amendment of articles of incorporation making corporation subject to this chapter; application of chapter**

Sec. 21. This chapter does not apply to any business combination of a resident domestic corporation the articles of incorporation of which have been amended to provide that the resident domestic corporation is subject to this chapter and that has not had a class of voting shares registered with the Securities and Exchange Commission under Section 12 of the Exchange Act on the effective date of the amendment, and that is a business combination with an interested shareholder whose share acquisition date is before the effective date of the amendment.

*As added by P.L.149-1986, SEC.27.*

**IC 23-1-43-22****Election not to be covered by this chapter; application of chapter**

Sec. 22. This chapter does not apply to any business combination of a resident domestic corporation:

- (1) the original articles of incorporation of which contain a provision expressly electing not to be governed by this chapter;
- (2) that, before the earlier of:
  - (A) September 1, 1987; or
  - (B) thirty (30) days after the date specified by a resolution of the board of directors adopted under IC 23-1-17-3(b), if the board of directors adopts such a resolution;adopts an amendment to the resident domestic corporation's bylaws expressly electing not to be governed by this chapter; however, an election under this subdivision may be rescinded by subsequent amendment of the bylaws; or
- (3) that adopts an amendment to the resident domestic corporation's articles of incorporation, approved by the affirmative vote of the holders, other than interested shareholders and their affiliates and associates, of a majority of the outstanding voting shares of the resident domestic corporation, excluding the voting shares of interested shareholders and their affiliates and associates, expressly electing not to be governed by this chapter, if the amendment to the articles of incorporation is not to be effective until eighteen (18) months after the vote of the resident domestic corporation's shareholders and does not apply to any business combination of the resident domestic corporation with an interested shareholder whose share acquisition date is on or before the effective date of the amendment.

*As added by P.L.149-1986, SEC.27.*

**IC 23-1-43-23****Inadvertent interested shareholder; application of chapter**

Sec. 23. This chapter does not apply to any business combination of a resident domestic corporation with an interested shareholder of the resident domestic corporation who became an interested shareholder inadvertently, if the interested shareholder:

- (1) as soon as practicable, divests itself of a sufficient amount of the voting shares of the corporation so that it no longer is the beneficial owner (directly or indirectly) of ten percent (10%) or more of the outstanding voting shares of the resident domestic corporation; and
- (2) would not at any time within the five (5) year period preceding the announcement date with respect to the business combination have been an interested shareholder but for the inadvertent acquisition.

*As added by P.L.149-1986, SEC.27.*

**IC 23-1-43-24****Interested shareholder on January 7, 1986; application of chapter**

Sec. 24. This chapter does not apply to any business combination with an interested shareholder who was an interested shareholder on January 7, 1986.

*As added by P.L.149-1986, SEC.27.*